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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

BRANDON ABBEY, Plaintiff and Respondent, v. FORTUNE DRIVE ASSOCIATES, LLC, Defendant and Appellant.	A124684 (San Mateo County Super. Ct. No. CIV 479539)
BRANDON ABBEY, Plaintiff and Respondent, v. JOHN SHEPUTIS et al., Defendants and Appellants.	(San Mateo County Super. Ct. No. CIV 480548)

Appellant Fortune Drive Associates, LLC (Fortune) is a Delaware limited liability company. Appellant John Sheputis, who is Fortune's sole manager, holds a majority interest in the company, while respondent Brandon Abbey had a much smaller interest. The Fortune operating agreement contained a provision permitting its amendment by a vote of the Fortune members and allowed for the judicial resolution of member disputes.[1]

During a disagreement with Abbey, Sheputis concluded Fortune's best interests would be served by removing him as a member. Sheputis circulated to members other

[1] The investors in a limited liability company are referred to as "members." (*Fashion Valley Mall, LLC v. County of San Diego* (2009) 176 Cal.App.4th 871, 874, fn. 1.)

than Abbey a draft amendment to Fortune's operating agreement that provided for the termination of a member upon the vote of other members and set the financial terms under which the termination would occur. At the same time, Sheputis proposed Abbey's termination under the new amendment. Both proposals were unanimously adopted, save for Abbey's vote.

The amendment allowing member termination contained a provision requiring any dispute over a termination to be arbitrated and requiring the arbitrator in any such dispute to value the ownership interest of the terminated partner in the manner specified by the amendment. After Fortune commenced an arbitration over the termination, Abbey filed an action to stay the arbitration, arguing the arbitration provision was unenforceable. When Abbey filed a lawsuit over his termination, Fortune filed a petition to compel arbitration of the claims of the lawsuit falling within the arbitration provision of the amendment. The trial court granted Abbey's request for a stay and denied the petition to compel arbitration, finding there was no enforceable agreement to arbitrate between Abbey and Fortune. We affirm.

I. BACKGROUND

Fortune is a limited liability company (LLC) organized under the laws of Delaware. It was founded by Sheputis in 2006 to engage in the business of acquiring former fabrication facilities and converting them into "data centers." Sheputis's personal LLC owns a majority interest in Fortune, and he is its sole manager.

In 2007, Fortune entered into an agreement with a company formed by Abbey, under which Abbey's company was to locate tenants for Fortune's planned data centers. Soon after, Abbey became an investor in Fortune, paying $100,000 for a 2.98 percent membership interest. In the purchase agreement for his membership interest, Abbey agreed to be bound by Fortune's operating agreement, "as amended" (Operating Agreement). Abbey, along with a few other new investors, was admitted as a member through a first amendment to the Operating Agreement.

By the time Abbey invested, in August 2007, Fortune had obtained an option to purchase a former fabrication plant, but it had not yet secured the credit and capital

necessary to complete the purchase. Sheputis eventually located an investor who, through the formation of a joint venture with Fortune, was willing to supply the necessary funds. Sheputis believed that accomplishing the joint venture would require a change in the structure of Fortune. In December 2007, he proposed the specific terms of a restructure of the company to the members of Fortune, offering them the opportunity to accept the restructure or withdraw from the company and receive a refund of their investment. The terms of the restructure were eventually embodied in a proposed second amendment to the Operating Agreement (Second Amendment), and all the members except Abbey agreed to the restructure by approving the terms of the Second Amendment.

Upon examining the documents related to the restructure, Abbey concluded the proposal enacted changes in the structure of the LLC adverse to the economic interests of the members, and he did not understand the necessity for these changes. Over a period of months, Abbey sought more information, neither agreeing to the restructure nor to a refund of his investment during discussions with Sheputis.

Abbey's consent to the Second Amendment was not necessary to authorize the restructuring. With the exception of specified "Major Decisions," the Operating Agreement could be amended by a majority vote of Fortune's membership interests. Even "Major Decisions," as specifically enumerated, could be effected by a two-thirds vote of the outstanding membership interests. Further, the "Amendments" provision of the Operating Agreement placed no substantive limits on amendment of the agreement, stating only "this Agreement may be amended, supplemented or restated only by the Managers and Approval of the Members," the latter defined as a majority vote of the ownership interests. Because Abbey owned a mere 3 percent voting interest, his refusal to approve the Second Amendment did not block its adoption in the face of otherwise unanimous agreement among the members.

Despite Abbey's inability to block the restructuring, after a period of discussion Sheputis concluded "it was . . . in the best interests of all of [Fortune's] Members for [Fortune] to involuntarily terminate and buy out [Abbey's] Membership Interest." The

Operating Agreement had no provision authorizing the involuntary termination of a member's interest, although a few boilerplate provisions referred in passing to the termination of a member. Members were not even entitled to withdraw voluntarily. To facilitate Abbey's ouster, Sheputis prepared a third amendment to the Operating Agreement (Third Amendment) that authorized the termination of a member upon the vote of three-quarters of the outstanding interests of the LLC and specified the financial terms of the repurchase, or "buyout," of the terminated member's interest. The Third Amendment also provided for the arbitration of any dispute "with respect to the determination of the Final Buyout Price or any other matter related to the buyout or termination." Not only did the Third Amendment require arbitration of termination disputes, but it also purported to constrain the arbitrator's discretion in the resolution of those disputes, stating: "The arbitrator will determine the Final Buyout Price for the Terminated Member's Interest, any offset due for damages and accrued interest. . . . The arbitrator will be bound by the terms and conditions of this Agreement and will have no power, in rendering his or her award, to alter or depart from any express provision of this Agreement, and his or her failure to observe this limitation will constitute grounds for vacating the award." Prior to adoption of the Third Amendment, the Operating Agreement had contained no restriction on judicial resolution of disputes, merely providing the agreement would be governed by Delaware law and requiring lawsuits relating to it to be filed in San Francisco.

Without prior notice to Abbey, in late April 2008, Sheputis caused a copy of the proposed Third Amendment to be e-mailed to all Fortune members eligible to vote, along with a solicitation for approval of Abbey's termination as a member. All members other than Abbey consented both to the amendment and to Abbey's termination pursuant to it.

In September 2008, Fortune sent Abbey a demand for arbitration regarding the value of his interest in Fortune upon its termination under the Third Amendment. Fortune thereafter commenced arbitration proceedings through the American Arbitration Association (AAA). Abbey had earlier filed, but not served, an action against Fortune, Sheputis, and others, raising claims associated with his work for Fortune as well as his

termination as a member. After service of Abbey's lawsuit, Fortune sent a second demand for arbitration, contending several of the claims in the lawsuit were within the scope of the arbitration provision of the Third Amendment.

Soon after, in December 2008, Abbey filed a declaratory relief action seeking a stay of the AAA arbitration and a declaration he was not bound by the arbitration provision of the Third Amendment. He then filed a motion for an order staying the AAA arbitration and declaring there was no enforceable agreement to arbitrate, arguing the agreement was unconscionable and he had not agreed to the arbitration provision nor waived his constitutional right to a jury trial. Although the trial court declined to rule on the request for declaratory relief, it stayed the arbitration in an order filed February 19, 2009.

Undeterred by the court's ruling, in March 2009, Fortune, Sheputis, and the other defendants in Abbey's original lawsuit filed a petition to compel arbitration of the claims in that lawsuit they contended were covered by the arbitration provision of the Third Amendment. Consistent with its earlier ruling, the trial court denied the petition to compel. The precise reasoning of the trial court was unclear, since its explanation on both occasions was simply, "No enforceable agreement to arbitrate exists between the parties."

II. DISCUSSION

Fortune contends the Third Amendment's agreement to arbitrate was binding on Abbey despite his failure to approve it because adoption of an arbitration agreement was within the scope of permissible amendments to the Operating Agreement under the provision allowing member amendments.

A. *Standard of Review*

Fortune has appealed two orders, identical in content but resulting from two different proceedings, potentially presenting two different standards of review. The first order came about in response to Abbey's motion for a stay of his participation in the AAA arbitration. Such a stay is, in substance, a preliminary injunction prohibiting the parties from proceeding to arbitration. " 'The party challenging an order granting or

denying a preliminary injunction has the burden of making a clear showing of an abuse of discretion. [Citation.] An abuse of discretion will be found only where the trial court's decision exceeds the bounds of reason or contravenes the uncontradicted evidence. [Citation.]' " (*Jay Bharat Developers, Inc. v. Minidis* (2008) 167 Cal.App.4th 437, 443.) When the matter raised on appeal is solely a question of law, however, the standard of review is not abuse of discretion but whether the law was correctly interpreted and applied by the trial court. (*Ibid.*)

The second order was a final order denying Fortune's petition to compel arbitration. A petition to compel must be decided by the court in a summary proceeding "in the manner . . . provided by law for the making and hearing of motions." (Code Civ. Proc., § 1290.2; *Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, 407, 413.) The court is required to conduct an evidentiary hearing only if the credibility of witnesses is at issue. (14 Cal.4th at p. 414.) There is no indication either party requested an evidentiary hearing here, suggesting their mutual concession that the material facts are not disputed. Under these circumstances, we review the trial court's denial of the petition to compel de novo. (*American Federation of State, County & Municipal Employees v. Metropolitan Water Dist.* (2005) 126 Cal.App.4th 247, 257.)

Because determination both of the motion for a stay and the petition to compel constituted the application of law to undisputed material facts, we review the trial court's ruling on both de novo.

B. *Agreements to Arbitrate*

The right to a jury trial to resolve civil disputes granted by article I, section 16 of the California Constitution is a fundamental right that can be waived only by consent. (*Grafton Partners v. Superior Court* (2005) 36 Cal.4th 944, 951.) Under the California Arbitration Act (Code Civ. Proc., § 1280 et seq.), which expresses a "strong state policy" in favor of arbitration, a written contract providing for arbitration constitutes consent to a waiver of the right to a jury trial. (*Grafton Partners*, at p. 964; Code Civ. Proc., § 1281.) Nonetheless, a genuine, enforceable agreement to arbitrate is required before such a waiver will be found. "[T]he parties must mutually agree to resolve their disputes in an

alternate forum. 'The strong public policy in favor of arbitration does not extend to those who are not parties to an arbitration agreement, and a party cannot be compelled to arbitrate a dispute that he has not agreed to resolve by arbitration.' " (*Lee v. Southern California University for Professional Studies* (2007) 148 Cal.App.4th 782, 786.)

C. *Badie v. Bank of America*

Abbey argues he never agreed to arbitrate with Fortune because the Operating Agreement did not provide for arbitration when he joined the LLC and he did not consent to the Third Amendment, which added the arbitration provision. Fortune, while recognizing Abbey never directly agreed to arbitrate, argues he was bound by the Third Amendment because it was a properly adopted amendment to the Operating Agreement.

We have found no precisely parallel authority, but *Badie v. Bank of America* (1998) 67 Cal.App.4th 779 (*Badie*), provides a useful guide for decision. The plaintiffs in *Badie* held credit cards issued by the defendant bank. When the plaintiffs first obtained their cards, the governing agreement did not contain an arbitration clause. It did, however, contain a provision stating that "all terms" of the card agreement were "subject to change" upon notice from the bank. After the plaintiffs obtained their cards, the bank mailed them a notice with their monthly bills stating the card agreement had been modified to require arbitration of any disputes. (*Id.* at pp. 785–786.) The plaintiffs contended the arbitration provision was unenforceable because they had not agreed to it, while the bank contended the plaintiffs' consent to the arbitration clause was unnecessary because they had already agreed to allow the bank to modify the terms of the card agreement, thereby effectively consenting to any subsequent changes made by the bank.

The court noted the fundamental issue was whether the parties had agreed to arbitrate, since agreement is a prerequisite to a valid arbitration provision. (*Badie*, *supra*, 67 Cal.App.4th at pp. 787–788.) Evaluating the bank's argument the plaintiffs were deemed to have agreed because the bank had contractual authority to modify the terms of the agreement, the court noted "[t]he contract modification cases cited by the Bank . . . do not support the proposition that a party with the unilateral right to modify a contract has carte blanche to make any kind of change whatsoever as long as a specified procedure is

followed. In fact, those cases suggest that a modification made 'in accordance with the terms of the contract' means, at least in part, a modification whose general subject matter was anticipated when the contract was entered into." (*Id.* at p. 791.) Based on these decisions, the court concluded there are three distinct constraints on the scope of amendments permitted under a clause authorizing the unilateral amendment of an agreement. The first, as with any contract, is the intent of the parties. (*Id.* at pp. 791–792.) The second constraint is the common law requirement that the terms of a contract be sufficiently definite. A contract that can be amended with complete freedom by less than all parties risks being found illusory. (*Id.* at p. 797.) Finally, every contract has an implied covenant of good faith and fair dealing that restricts the power of the parties to act in a manner contrary to the interests of other parties to the contract. The amending party's duty to comply with this covenant limits the scope of the amendments it can adopt. (*Id.* at p. 796.)

After discussing a variety of decisions and the foregoing legal constraints, the court concluded the issue before it was ultimately one of contract interpretation and construed the card agreement to determine what the parties intended when they agreed the bank could modify the "terms" of the card agreement. (*Badie, supra,* 67 Cal.App.4th at pp. 798–800.) The court ultimately held, for several reasons, the parties had not intended to give the bank the authority to amend the agreement to eliminate the right to have disputes resolved in the civil justice system. (*Id.* at pp. 801–804.)

Because of differences in the texts of the agreements and the respective circumstances of the parties, the result in *Badie* is not necessarily controlling here. The court's mode of analysis, however, is directly applicable. Just as the plaintiffs did in *Badie,* Abbey executed an agreement that, by its terms, could be amended by other parties without his consent. In *Badie,* the agreement could be amended by the bank; here, the Operating Agreement can be amended by the other members of the LLC. The issue here, as it was in *Badie,* is one of contract interpretation: whether the type of amendment

adopted without Abbey's consent was within the contemplation of the parties as a permissible amendment when he agreed to be bound by the Operating Agreement.[2]

D. *Choice of Law*

Before proceeding to construction of the Operating Agreement, we must address Fortune's claim that the Federal Arbitration Act (9 U.S.C. § 1 et seq.) (FAA), rather than California law, should be applied. In arguing for the application of federal law, Fortune fails to satisfy the fundamental prerequisite for a conflict of laws analysis: to demonstrate there is a "material conflict" between the law of the forum and the law of the proposed alternative jurisdiction. (*Grosset v. Wenaas* (2008) 42 Cal.4th 1100, 1107; *Washington Mutual Bank v. Superior Court* (2001) 24 Cal.4th 906, 919–920 [if the laws of two jurisdictions are identical, the court may apply California law].) Fortune has not cited a single decision suggesting the general analytic framework established by *Badie* would differ under federal law. On the contrary, as Fortune acknowledges, when deciding whether a party has agreed to arbitrate a particular issue—in other words, when interpreting the terms of a contract containing an arbitration agreement—the FAA applies state contract law. (*Perry v. Thomas* (1987) 482 U.S. 483, 492, fn. 9.) Because the issue here is whether Abbey has agreed to be bound by the arbitration provision of the Third Amendment, we apply California law of contract interpretation under both the FAA and state arbitration law.

We do agree with Fortune, however, that Delaware law governs "all issues concerning [Fortune's] organization and internal affairs and the authority of its Manager and Members." As a general rule, the law of the state of organization is used to

[2] Fortune argues we should follow *Gear v. Webster* (1968) 258 Cal.App.2d 57, in which a realtor was held to be bound by an arbitration provision in the bylaws of a board of realtors that was adopted after she joined the board. (*Id.* at pp. 61–62.) Because it was dealing with a corporate entity rather than an entity governed by contract law, however, the *Gear* analysis is inapplicable.

determine issues regarding a business entity's internal affairs.[3] (*Vaughn v. LJ Internat., Inc.* (2009) 174 Cal.App.4th 213, 223.)

E. *Construing the Amendment Provision in the Operating Agreement*

There is no basis for concluding the adoption of an arbitration clause by the Fortune members would *necessarily* have been beyond the intention of the parties to the Operating Agreement. Unlike the *Badie* agreement, the Operating Agreement is not a contract of adhesion, and Fortune is not an entity allowing the participation of the general public. Further, unlike the credit card agreement in *Badie,* the Operating Agreement already addresses the issue of dispute resolution. By specifying the forum jurisdiction for any lawsuit filed by members, the Operating Agreement implicitly authorizes dispute resolution in the civil courts. Business investors are well aware of the possibility disputes will occur, of the advisability for adopting a method of resolving those disputes, and of the various options available to them, including arbitration. We see nothing in the agreement to suggest the members intended to preclude themselves from deciding at some future time that arbitration was a preferable method of dispute resolution from the method selected when the Operating Agreement was formed.

That said, it is necessary to examine the exact nature and circumstances of the arbitration provision in the Third Amendment to determine whether its addition was within the contemplation of the parties. As this case vividly demonstrates, not all arbitration agreements are created equal. Had the arbitration provision been adopted at a time when there was no foreseeable dispute among the members and no foreseeable advantage or disadvantage to any particular member in changing the specified means of dispute resolution, and had the arbitration provision applied broadly to all disputes, there is no obvious basis for finding it outside the contemplation of the parties.

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[3] We do not understand Fortune to argue for application of Delaware law to the issue of contract interpretation. In any event, as with federal law, Fortune does not demonstrate the result would be different under Delaware law. On the contrary, in *Edelist v. MBNA America Bank* (Del.Super. 2001) 790 A.2d 1249, 1260, the court discussed *Badie* without suggesting its analysis was incompatible with Delaware contract law.

That is not what happened here. The arbitration amendment was adopted at a time when the members had particular reason to anticipate a dispute with Abbey, since the amendment was proposed simultaneously with Abbey's clandestine and involuntary termination. The amendment was not written broadly to apply to any dispute that might occur among the members but was targeted specifically at disputes over termination—in this context, at any dispute that might arise with Abbey. Further, the arbitration amendment contained conditions that limited the type of claims Abbey could bring and restricted the recovery he could receive by forcing the arbitrator to apply the specific provisions of the Third Amendment. While the members might have anticipated adopting arbitration in a manner that was not prejudicial to their individual interests, it is inconceivable any member intended to authorize the majority's adoption of an arbitration provision that would benefit other members at the expense of his or her own interests. Yet that is what the Third Amendment's arbitration provision would accomplish in any dispute with Abbey.

In its reply brief, Fortune attempts to meet this argument by urging us to "disregard [Abbey's] improper attack on [Fortune's] motives" in considering the enforceability of the arbitration provision. Regardless of the subjective motives of Fortune's members, the implications of the Third Amendment's arbitration provision are objectively unmistakable. Sheputis acknowledged in a declaration that the Third Amendment was drafted with the specific purpose of providing a means of terminating Abbey's interest. Even without that admission, the Third Amendment was enacted simultaneously with Abbey's termination and created the mechanism for that termination. To deny or ignore the connection would be absurd. As noted above, the arbitration provision is neither general nor neutral in its content. It is specifically drafted to apply only to disputes over termination, and there is no evidence any member's termination was contemplated other than Abbey's. Further, the provision was drafted to provide an advantage to Fortune in the legal positions it would assert in any arbitration over

termination. The foregoing is true regardless of whether the members subjectively intended to target Abbey in adopting the Third Amendment.[4]

Fortune also argues the lack of any express limitation in the Operating Agreement on the authority of the majority to amend should be interpreted to mean no constraints on that authority were intended, given the wide authority granted by Delaware law to LLC members to structure their business entity through the mechanism of the operating agreement.

A limited liability company is " 'a relatively new, . . . hybrid form . . . of business entity . . . that combines the liability shield of a corporation with the federal tax classification of a partnership. . . . A creature of state law, each LLC is organized under an LLC statute that creates the company, gives it a legal existence separate from its owners (called "members"), shields those members from partner-like vicarious liability, governs the company's operations, and controls how and when the company comes to an end. The essence of an LLC is the co-existence of partnership tax status with corporate-like limited liability.' " (*Fashion Valley Mall, LLC v. County of San Diego, supra,* 176 Cal.App.4th 871, 874, fn. 1.)[5] The heart and soul of an LLC is the operating agreement, which "ordinarily sets forth the agreement of the LLC's members, much as a partnership agreement sets forth the agreement of the partners." (Forming and Operating California Limited Liability Companies (Cont.Ed.Bar 2d ed. 2009) § 1.11, p. 6.)

Delaware law "generally permits members [of an LLC] to engage in private ordering with substantial freedom of contract to govern their relationship, provided they do not contravene any mandatory provisions of the [Limited Liability Company] Act."

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[4] Fortune argues that, given the general policy in favor of arbitration, we should not draw negative inferences from its adoption of arbitration regarding the claims against Abbey. As noted above, we would not necessarily find a general and neutral arbitration provision beyond the intent of the parties. This was not such a provision.

[5] In California, the governing statute is the Beverly-Killea Limited Liability Company Act of 1994 (Corp. Code, §§ 17000–17656); Fortune was organized under Delaware's Limited Liability Company Act (6 Del. C. §§ 18-101–18-1109) (Delaware Act).

(*Elf Atochem North America, Inc. v. Jaffari* (Del. 1999) 727 A.2d 286, 290, fn. omitted.) "The basic approach of the Delaware Act is to provide members with broad discretion in drafting the Agreement and to furnish default provisions when the members' agreement is silent. The Act is replete with fundamental provisions made subject to modification in the Agreement (e.g. 'unless otherwise provided in a limited liability company agreement. . . .')." (*Id.* at p. 291, fns. omitted.) As the Delaware Act itself states, "[i]t is the policy of this chapter to give the maximum effect to the principle of freedom of contract and to the enforceability of limited liability company agreements." (6 Del. C. § 18-1101(b).) As a result, " 'the Act gives members virtually unfettered discretion to define contractually their business understanding, and then provides assurance that their understanding will be enforced in accordance with the terms of their limited liability company agreement.' " (*Elf Atochem North America, Inc. v. Jaffari,* at p. 291, fn. 25.) Given this freedom, there is no doubt an arbitration agreement contained in an operating agreement will be enforced if it was included from the first. (*Id.* at p. 292.)

Delaware's grant of freedom to members to structure their operating agreement at the outset of an LLC, however, does not necessarily mean that the members have the same broad authority to *amend* the operating agreement after LLC formation, at least if the amendment is less than unanimous. The flexibility provided under Delaware law is intended to permit members to structure their business entity as they deem most effective to carry out its purpose. Once the business structure has been established and the operating agreement executed, however, it becomes a contract, subject to the same general law as every other contract. Nothing in the Delaware statutes and decisional law cited by Fortune suggests an operating agreement is to be enforced or interpreted in a manner different from other contracts, other than the application of the specific provisions of the Delaware Act.

As *Badie* noted, amendment of a contract by less than all parties is subject to certain common law constraints. First and foremost, as discussed above, is the intent of the parties. Once an operating agreement has been created and executed, the members' expectations constrain the changes that can be made to that agreement without the

consent of all members. In addition, the requirement of definiteness and the obligation of parties to act in good faith and deal fairly limit the scope of amendments.[6] (*Badie*, *supra*, 67 Cal.App.4th at pp. 796–797.) The Fortune members were also subject to fiduciary duties, not applicable to the *Badie* card agreement parties, that similarly limit the scope of non-unanimous amendments.[7] Accordingly, while the members of an LLC are free to adopt arbitration as a method of dispute resolution at the outset of the LLC, that does not necessarily mean they can subsequently impose arbitration on unwilling members through a majority-supported amendment. The scope of the amendment authority is an issue of traditional contract interpretation, based on the intent of the parties, and we conclude the arbitration clause in the Third Amendment, adopted in the circumstances presented here, went beyond the scope of amendments anticipated by the members.[8]

Because we conclude the arbitration provision was beyond the intent of the parties in permitting majority amendment of the Operating Agreement, it cannot be enforced to deprive Abbey of his right to a judicial forum. We therefore need not address Abbey's alternative claim that the arbitration provision is unconscionable.

We emphasize this is a ruling as to the arbitration provision of the Third Amendment only. Abbey has asserted various claims relating to the substantive provisions of the Third Amendment. The merits of those claims are not before us, and

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[6] While Delaware law allows LLC members to specify in the operating agreement their duties to each other, it specifically precludes the operating agreement from "eliminat[ing] the implied contractual covenant of good faith and fair dealing." (6 Del. C. § 18-1101(c).)

[7] Although Delaware law permits the members of an LLC to alter by contract their fiduciary duties to each other (6 Del. C. § 18-1101(c)), the Operating Agreement contains no restriction on such duties. The members of Fortune therefore owed to each other "the traditional fiduciary duties that directors owe a corporation." (*Bay Center Apartments Owner, LLC v. Emery Bay PKI, LLC* (Del.Ch., Apr. 20, 2009, C.A. No. 3658-VCS) 2009 Del.Ch. Lexis 54, *27, fn. 33.)

[8] Whether the arbitration provision of the Third Amendment also violated the members' fiduciary duties and the implied covenant of good faith and fair dealing is a substantial question that was not raised by the parties below. For that reason, we do not address it here.

we express no opinion as to them. The finding that an arbitration clause is unenforceable does not affect the validity of the remaining provisions of a contract. (*Kleveland v. Chicago Title Ins. Co.* (2006) 141 Cal.App.4th 761, 765.)

III. DISPOSITION

The judgment of the trial court is affirmed.

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Margulies, J.

We concur:

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Marchiano, P.J.

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Dondero, J.